

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 23-10063-shl

4 - - - - - x

5 In the Matter of:

6

7 GENESIS GLOBAL HOLDCO, LLC,

8

9 Debtor.

10 - - - - - x

11 United States Bankruptcy Court

12 300 Quarropas Street

13 White Plains, NY 10601-4140

14

15 Thursday, October 12, 2023

16 2:07 PM

17

18

19

20

21 B E F O R E :

22 HON SEAN H. LANE

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: ARIANNA PERSAUD

1 HEARING re Doc. #791 Notice of Agenda

2

3 HEARING re Discovery Conference

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 CLEARY GOTTlieb STEEN HAMILTON LLP

4 Attorneys for Debtors

5 One Liberty Plaza

6 New York, NY 10006

7

8 BY: ANDREW WEAVER

9 LUKE A. BAREFOOT

10

11 LATHAM WATKINS

12 Attorney for Three Arrows Capital Ltd.

13 355 South Grand Avenue, Suite 100

14 Los Angeles, CA 90071-1560

15

16 BY: NIMA MOHEBBI

17

18 WHITE & CASE

19 Attorney for Official Committee of Unsecured Creditors

20 1221 Avenue of the Americas

21 New York, NY 10020

22

23 BY: COLIN WEST

24

25

1 P R O C E E D I N G S

2 THE COURT: Good afternoon. This is Judge Sean
3 Lane in the United States Bankruptcy Court for the Southern
4 District of New York, and we are here for a conference this
5 afternoon in the Genesis Global Holdco, LLC case. There's
6 an agenda for that at Docket Number 791. So let's start
7 with getting appearances, first from the debtors.

8 MR. WEAVER: Good afternoon, Your Honor. Andrew
9 Weaver, Cleary Gottlieb Steen & Hamilton LLP, on behalf of
10 the debtors, along with my colleague, Luke Barefoot.

11 THE COURT: All right. Good afternoon to you
12 both. And on behalf of the Official Committee of Unsecured
13 Creditors?

14 MR. WEST: Good afternoon, Your Honor. Colin
15 West, of White & Case, on behalf of the official committee.

16 THE COURT: All right, and on behalf of Three
17 Arrows Capital?

18 MR. MOHEBBI: Good afternoon, Your Honor. Nima
19 Mohebbi, Latham & Watkins, on behalf of the joint
20 liquidators, Three Arrows Capital.

21 THE COURT: All right. Good afternoon. And I
22 realize, as always, we have a lengthy list of folks who are
23 here, but certainly a lot of those folks won't participate.
24 So let me, at this point then, throw it open to anybody else
25 who wishes to make an appearance at this time. And if you

1 don't because you don't expect to speak and then later, that
2 changes, that's fine. But anybody else who wants to make an
3 appearance now?

4 All right. So with that, I will turn it over to
5 the debtors, who are the folks who requested this informal
6 conference. Take it away.

7 MR. WEAVER: Thank you, Your Honor. Again, for
8 the record, Andrew Weaver, Cleary Gottlieb Steen & Hamilton,
9 on behalf of the debtors. We appreciate Your Honor making
10 himself available so quickly for us. And I apologize that
11 we are here on a discovery issue, but we will try to be
12 brief in our description of issue for Your Honor and know
13 that although we appreciate Your Honor's practice of not
14 requesting letter briefs before we appear before you, the
15 debtors, of course, to the extent you would find it helpful,
16 we're more than happy to submit additional briefing after
17 our discussion today.

18 But the focus today is on the 3AC's, the foreign
19 representatives of the liquidators desire to depose the
20 general counsel of the debtors, Ms. Arianna Pretto-Sakmann.
21 Your Honor, we acknowledge at the very beginning that,
22 obviously, discovery in these matters is more of a liberal
23 standard. In the Second Circuit, there is no automatic
24 block of taking a deposition of a lawyer. The standard is
25 pretty well defined in the Second Circuit, known as the

1 Friedman factors, on whether or not there's an undue
2 hardship or burden when seeking depose counsel.

3 The factors that are relevant here, Your Honor,
4 that we think clearly show undue hardship, include whether
5 or not there's a need to depose the lawyer, the lawyer's
6 role in connection with the matter on which discovery is
7 sought and in relation to the pending litigation, the risk
8 of encountering privilege and work product and the extent of
9 discovery already conducted.

10 Taking a step back, Your Honor, just to provide
11 some context to how we got here, I'm sure you remember that
12 we began actually litigating the schedule in this matter
13 before you at the beginning of September. At that time, we
14 had submitted a proposed schedule. The board
15 representatives filed an objection to our schedule on
16 September 5th. At Paragraph 24 of ECF 673, they noted at
17 that point they intended to depose three fact witnesses, a
18 30(b)(6) and some non-party witnesses. Thereafter, on
19 September 7th, they did notice three fact witnesses, former
20 and current employees of the debtors, and a 30(b)(6).

21 On September 12th, they noticed yet another fact
22 witness, a former employee of the debtors as well. And then
23 on September 27th, they sent us a list of 17 current and
24 former employees to see who we represented and who we might
25 be able to make available for a deposition. Thereafter,

1 they identified five more fact witnesses that they wanted to
2 take a deposition of, so that's in total, nine fact
3 depositions, along with the 30(b)(6) of the debtors, along
4 with third-party discovery.

5 It was only after that, Your Honor, on October
6 3rd, for the first time, that counsel for the foreign
7 representatives indicated they wished to depose the general
8 counsel of the debtors. And Your Honor, when we pushed back
9 on this request, arguing that any testimony, non-privileged
10 testimony, would be duplicative, there would be obviously a
11 great risk of dealing with privilege issues beyond the fact
12 that Genesis is in the middle of this bankruptcy proceeding
13 with limited resources available to it, the distraction that
14 it would cause to the estate to be able to prepare a witness
15 who most likely would have to claim privilege throughout the
16 course of the deposition.

17 In response to our pushback, counsel essentially
18 pointed to two reasons why testimony of the general counsel
19 was appropriate here, one of which related to meetings that
20 took place early in the case, settlement negotiations and
21 discussions where the general counsel participated which are
22 not at all relevant to the actual claims filed by the
23 liquidators for 3AC in this court before you. And more
24 specifically, they pointed to a witness statement that the
25 general counsel had submitted in an unrelated matter in

1 2022.

2 In particular, Your Honor, just for context, in
3 June of 2022, Your Honor will become familiar with all these
4 facts as this case proceeds, this matter proceeds. But when
5 Three Arrows defaulted on their loans to Genesis, Genesis
6 went in to file an arbitration at that time to seek to
7 recover certain rights they had under the lending
8 agreements. As part of that arbitration, Genesis filed a
9 motion for emergency relief under Rule 38 of the AAA's
10 Commercial Arbitration Rules and Procedures. This is in
11 June of 2022.

12 As part of that motion for emergency relief, the
13 general counsel did submit a witness statement specifically
14 responding to comments that had been made at a hearing
15 earlier that month that the general counsel was present at,
16 and the declaration at issue, the witness statement that was
17 put forth covered a number of issues.

18 And I'll summarize here, and again, we're happy to
19 spell this out in greater detail, but really focused on,
20 one, attaching documents that were relevant to the emergency
21 motion. There was a discussion about the correct amount of
22 the loans between 3AC and Genesis, and within the witness
23 statement there was a chart prepared, a two-page chart
24 showing the loan amounts. Not surprising, Your Honor, there
25 are much more sophisticated spreadsheets and charts that

1 have been produced here in this matter covering the loans
2 that are at issue and not based upon the declaration
3 submitted over a year and a half ago.

4 The witness statement also covers the propriety of
5 the authority of the individuals who served the default
6 notice on 3AC and again, attaching resolutions that showed
7 the authority of the individuals to act. Then there was a
8 description of news accounts describing what the press is
9 reporting on whether or not 3AC would be able to repay its
10 debts and whether Genesis would be at risk of its rights not
11 being satisfied through the course of the arbitration, thus
12 necessitating the emergency motion that had been filed.

13 So that obviously, Your Honor, was a part of an
14 arbitration that was taking place prior to the bankruptcy
15 that brings us before Your Honor here today. The dispute
16 before Your Honor is obviously the claims objection that had
17 been filed by the debtors against the claims that 3AC has
18 filed in this bankruptcy, and there's been extensive amount
19 of discovery already produced.

20 The claims objection itself includes a sworn
21 declaration statement by the interim CEO of Genesis who's
22 already been before you in the FTF settlement litigation,
23 Your Honor, as well as detailed nine fact witnesses and a
24 30(b)(6) that will be taking place. Here, Your Honor, if
25 we're looking at just that declaration as a basis to depose

1 general counsel, we think this does not get anywhere close
2 to satisfying the elements of the Friedman factors, in part
3 because, one, to the extent there are any facts within the
4 declaration that are relevant to the dispute before the
5 court, it is more than covered by the witness statements
6 that have already been submitted, plus the discovery that
7 will be taken through additional depositions and the
8 documents.

9 Moreover, Your Honor, the idea that the general
10 counsel's role as it relates to the litigation at issue,
11 which is, in fact, their claims and our objection, the
12 counsel for the liquidators have not put into any facts
13 specific to that dispute, simply to the fact that there was
14 a declaration submitted in an arbitration between the
15 parties prior to bankruptcy.

16 So we're trying to be brief as we can. As I said,
17 we're happy to outline the declaration and where the other
18 evidence that is relevant is found within the record already
19 or where we expect it to be found. We think that this
20 request from the liquidators is simply not only duplicative,
21 but frankly extremely wasteful, disruptive to the debtors.
22 And really, I've heard of no reason why fact evidence from
23 the general counsel would be relevant to disputes that are
24 at issue here.

25 THE COURT: All right. Thank you very much for

1 that overview. I appreciate it. So with that, let me hear
2 from Three Arrows Capital.

3 MR. MOHEBBI: Thank you, Your Honor. So just to
4 respond I think pretty directly, the Friedman factors are
5 more than satisfied here and the articulation of Mr. Weaver
6 in terms of why Ms. Pretto-Sakmann's testimony is relevant,
7 it certainly goes to the declaration. And I just want to be
8 clear for the record that the arbitration initiated by
9 Genesis after the Three Arrows default does, in a very much
10 direct way, cover the very assets and issues that are at
11 play in connection with this case. Ms. Pretto-Sakmann's
12 declaration was not submitted at a time when Cleary was
13 counsel for Genesis.

14 So I certainly believe it's probably the case that
15 they would have not done that had they been counsel. But
16 it's not just a declaration. It's a 15-page declaration
17 that makes very fundamental pronouncements on issues of
18 fact, including whether or not the very margin calls that we
19 dispute were proper and made in the ordinary course of the
20 party's relations. These are primary core issues in our
21 litigation here. But despite just the declaration --

22 THE COURT: Well, let me -- so let me ask sort of
23 what I think may be the theme for this. There are lots of
24 times people -- and this is almost sort of a 30(b)(6)
25 problem as well, is there are times when folks are speaking

1 on behalf of an organization and they are sort of the top
2 end of the informational pyramid and they gather the
3 information. And their own personal extent, other than
4 essentially providing the declaration, is a lot more limited
5 than providing the declaration might suggest. There are
6 other times when folks, they are actually the folks who were
7 involved.

8 And so my question is what kind of sense anyone
9 has here about this witness looking at it from that point of
10 view because obviously, if you are talking to the general
11 counsel, there would be a need to separate out what's done
12 as a matter of the business aspect, which is not privileged
13 versus what's done in terms of offering advice.

14 But when you think about what's happening as a
15 matter of the business, what I understand general counsels
16 do is their clients want to do things and they come to their
17 clients. Those clients come to their lawyers saying, I want
18 to do this. Tell me about the legal ramifications or
19 whether this is a problem. And the lawyers aren't the ones
20 coming up with the business plan or the business decision.
21 They're the ones providing legal advice on it. So what can
22 you tell me about your view about this witness from that
23 perspective?

24 MR. MOHEBBI: Sure, Your Honor. It's a great
25 question. It's actually where I was going next, which is to

1 say there's a reason that she provided a factual
2 declaration. She was very much involved in the day-to-day
3 business. There are several documents that we've uncovered
4 throughout the production, for instance, where she's
5 engaging in detailed discussions with our client about
6 pledge agreements, about certain assets that were supposed
7 to be pledged. Very much involved in business strategy.
8 She is, in fact, the signatory on the key loan agreements at
9 issue here, or at least one of the signatories. She's a
10 signatory on the assumption and assignment agreement to DCG.
11 She is the one who wrote and issued the notice of default.
12 She was involved in extensive discussions with the parties.
13 And so --

14 THE COURT: Well, let me drill down on that a bit.
15 So is she involved in the way we were just discussing, which
16 is some clients said, here's what I want to do, and she gave
17 them legal advice, or is she somebody -- again, I'm trying
18 to understand her as making the call on margins and things
19 of that sort. That seems a little at odds with what I
20 understand a general counsel does.

21 So I guess there's a couple of ways to view that
22 is, I don't know if you've deposed the other people who are
23 on this correspondence that you say is sort of the basis for
24 her involvement or your desire to depose her, because
25 there's often a way of saying, well, we'll do everything up

1 to but not including the lawyer. And then we'll see what's
2 left and what questions we might still have answered that
3 need to be answered.

4 MR. MOHEBBI: That's a perfectly reasonable
5 perspective. I think, to be clear, our view is that she was
6 playing the role of a business person and probably was doing
7 legal advice behind the scenes. But I think that the
8 evidence shows that she was doing a lot of business and,
9 frankly, was key factually in these discussions, including
10 in interactions with our client or our former founders. So
11 the answer is that certainly general counsels in a lot of
12 situations do play multiple roles and they wear multiple
13 hats. I think Ms. Pretto-Sakmann in particular wore a very
14 obvious business hat here, such that it literally led to her
15 submitting a 15-page declaration on key elements and facts
16 in the case. Now if the --

17 THE COURT: Does she have a corporate -- does she
18 have another title other than general counsel?

19 MR. MOHEBBI: I honestly don't know, but there
20 wasn't a lot of formality here in general, as is probably
21 unfortunately typical in these crypto cases, that folks
22 didn't really, and particularly from what we've seen from
23 the Genesis documents, did not follow typical formalities
24 that you might expect them to have followed. This is not
25 JPMorgan essentially. This is a very different operation.

1 And I think the notion that we see here is that she's
2 wearing a number of hats, and I'm not saying that was a bad
3 thing. I'm just saying that if she's competent enough
4 factually to give an extensive background statement and
5 basically claim that -- essentially assert that our factual
6 statements about the party's working loan relationship were
7 just fundamentally false, then she is somebody, frankly,
8 that we think is important to depose. But I hear Your Honor
9 --

10 THE COURT: Well, but yes and no. So if she's not
11 a lawyer, then we're not having this discussion because even
12 in the debtors, she might be one of several people who know
13 a certain amount of things and you might argue about whether
14 they're the right 30(b)(6) witness. So are you done?
15 What's the status of your discovery in terms of deposing
16 people and how many other people are there to be deposed and
17 on what subjects?

18 I'm trying to figure out whether it makes sense to
19 go forward with that, fill out the factual picture and also
20 communicate with the debtors in terms of saying, well, here
21 are the things that we think are the correspondence or other
22 documents that are the things. Again, you don't have to
23 give away your entire deposition strategy, but I can't
24 imagine -- you're all well-prepared people, so you all know
25 what documents her name is on. So I don't think you're

1 giving away the case crackers, as my cousin Vinny would say.

2 So if you can identify those documents and then
3 just have a candid conversation among counsel after you
4 finish your other discovery as to what's needed or not, I do
5 think it's probably in everybody's best interest that even
6 if you did have a deposition go forward, that it's well-
7 defined what the topics are and aren't because you don't
8 want to be forever mired in assertions of privilege during
9 the deposition, I would think.

10 MR. MOHEBBI: Absolutely, Your Honor, and we would
11 very much not be seeking any privileged communications and I
12 think that's a reasonable approach. The only thing I would
13 ask Your Honor is that we have sort of a tight schedule in
14 terms of when depositions are supposed to be completed. And
15 so if Genesis, if the debtors will agree to have that
16 discussion perhaps after the deposition period has finished
17 and we wouldn't be sort of prejudiced from approaching the
18 topic at that point, I think that that's a very reasonable
19 solution and one that would be acceptable to us so that
20 we're not, as Mr. Weaver said, creating work. That's
21 certainly not our intention.

22 And just to be clear, when he listed that long
23 list of fact witnesses, that list has been substantially
24 winnowed down. We just started depositions yesterday and
25 they are going pretty aggressively in each of the following

1 weeks. And we appreciate the debtors and are working, I
2 think have worked well together on those issues. So I'm
3 very happy to approach this in a way that makes sense that
4 we can complete the discovery, the fact discovery and if we
5 find that there are holes that we believe it's important for
6 Ms. Pretto-Sakmann to fill, we will have that discussion and
7 have a meet and confer, as you suggest.

8 THE COURT: Yeah. And I would think obviously,
9 during the course of building out your factual case, you'll
10 ask a lot of people who else was in the room? Who else was
11 involved in these emails? What was this person's role?
12 That person's role? So you'll have a much better --
13 everyone will have a much better sense of what the contour
14 of the land is. And I would think we'll then be able to
15 figure out much more easily the answer to this question.

16 And sometimes I think -- and this seems to be
17 where we are. One party knows a lot more about things in
18 terms of what this person's role is, but it's sort of a
19 trust but verify situation, so you don't, and so you'll sort
20 of catch up and get a sense of that and then figure out
21 what's worth pursuing or not. So let me hear back from the
22 debtors, obviously, in terms of thinking about a potential
23 approach, whether that kind of approach makes sense to you.

24 MR. WEAVER: Thank you, Your Honor. Again, for
25 the record, Andrew Weaver, Cleary Gottlieb, on behalf of the

1 debtors. Your Honor, we're happy to take guidance from you
2 on moving forward with discovery and revisiting as
3 necessary. As I think we pointed out, we've not been
4 pointed to any particular facts other than this declaration.
5 And I think Your Honor very accurately, without even seeing
6 the declaration, understands the context of that
7 declaration, particularly in an emergency motion. A year
8 and a half ago, I think if you were to see the declaration,
9 it would be very --

10 THE COURT: In my former life, I was involved in
11 submitting declarations from the head of the CIA and the
12 chairman of the Joint Chiefs of Staff. So I have some
13 familiarity with the knowledge pyramid. Yes.

14 MR. WEAVER: Yeah. So of course, we're happy to
15 move forward with the significant number of depositions that
16 have been scheduled in this matter. And of course, we're
17 happy to continue discussing that with counsel for the
18 liquidators.

19 I think, Your Honor, just by way of preview,
20 though, I think on some of the points that have been raised,
21 the issues that are at play in this litigation on the claims
22 objection really go to the business of Genesis and the
23 business of 3AC. And I don't think we're going to find
24 anything that's unique to the role of the general counsel
25 beyond the types of things that you've already identified,

1 Your Honor. And the fact that someone has signed a document
2 as the chief legal officer is common and I don't think
3 brings folks within the scope of fact witness to the level
4 necessary.

5 THE COURT: I'm not disagreeing with you. I guess
6 my thought is that this is one of these kinds of disputes
7 where arguing about the theoretical is much more difficult
8 and also expensive and inefficient than arguing about the
9 practical. So if you can narrow things by talking to other
10 folks, filling out the picture that obviously, Mr. Weaver
11 and Mr. Barefoot, you have a much better sense of these
12 things than counsel for Three Arrows Capital does at this
13 point, and especially since Three Arrows Capital, as the
14 liquidators, they don't have the benefit of the kind of
15 input you're getting from your client.

16 So there's definitely an information deficit and
17 disparity. And what I would suggest we do is you all work
18 out the details of this, but you get through everything
19 else, deal with this issue at the end. But I would expect,
20 before anything else comes back to me, that you will have
21 talked about the specific documents that might be the basis
22 for the request and that Three Arrows counsel will have a
23 much better sense of the factual lay of the land, who's
24 doing what, what roles people played.

25 And my suggestion would be, as long as this didn't

1 hamper anyone's ability to take steps needed in Chapter 11
2 case, is to come back for another conference and then we can
3 figure out what exactly needs to be briefed. I don't want
4 you all to have to write a treatise on attorney depositions
5 that doesn't -- it's just not a useful way to spend your
6 time.

7 But obviously I want to make sure to hear very
8 specifically where this falls in the realm of the test you
9 mentioned and exactly what we'd be -- if there's going to be
10 a deposition, exactly what topics are fair game and what
11 topics aren't. So I would anticipate if we do need to have
12 further discussions, there'll be some briefing. But I would
13 imagine it should be fairly targeted. And if you all talk
14 to each other as you go through, you all should probably
15 hopefully be pretty close on the same page as to what that
16 kind of briefing should address.

17 But we'll see how it goes. And again, I'm happy
18 to have these kind of conferences when they can be efficient
19 and save you all time. You have enough stuff to do in this
20 case, everyone agrees and discovery, spend enough time with
21 discovery. So I'm happy to chat with you all whenever it's
22 helpful.

23 MR. WEAVER: We appreciate that. Thank you very
24 much.

25 THE COURT: So what I'll do is I'll wait to hear

1 from you all. Again, anything that you think you've reached
2 a point where it would be efficient and in everybody's best
3 interest to touch base on this, happy to do it. Just as
4 long as you're talking to each other and you understand
5 that's happening Don't want to surprise anyone.

6 So if you wanted to add it to an agenda at a
7 certain point on one of these hearings in the future just to
8 touch base, again, as long as everybody knows that's
9 happening, happy to do that, or also happy to just wait. If
10 things are going productively and well and you don't want to
11 poke the bear, then that's fine too. So I'll be guided by
12 your considered professional judgment and obviously if we
13 need a specific answer to this issue, I'll make sure to get
14 it to you in a prompt way.

15 MR. WEAVER: Thank you very much, Your Honor.

16 THE COURT: All right.

17 MR. MOHEBBI: Thank you, Your Honor.

18 THE COURT: Anything else from debtors?

19 MR. WEAVER: Nothing further, Your Honor, today.
20 Thank you.

21 THE COURT: All right. Anything else from Three
22 Arrows Capital?

23 MR. MOHEBBI: No, Your Honor.

24 THE COURT: All right. I didn't hear from the
25 committee. But in an abundance of caution, I'll ask if

1 there's anything from the committee.

2 MR. WEST: No, Your Honor. We appreciate the
3 court guiding us to an efficient solution here. Thank you.

4 THE COURT: All right. Thank you. Be well and
5 see you all soon. Court is adjourned until the next hearing
6 at 3:00.

7 (Whereupon, these proceedings were concluded at 2:36
8 p.m.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: November 2, 2023